INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	2
Argument	4
Conclusion	10

CITATIONS

Cases:

American Chain & Cable Co., Inc. v. *Federal Trade Commission*, 142 F. 2d 909 — 7

Automatic Canteen Co. v. *Federal Trade Commission*, 346 U.S. 61 — 9

Consolidated Edison Co. v. *National Labor Relations Board*, 305 U.S. 197 — 8

Federal Trade Commission v. *Cement Institute*, 333 U.S. 683 — 6

Metropolitan Bag and Paper Distributors Association, Inc., et al. v. *Federal Trade Commission*, No. 190, this Term — 3

Statutes:

Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45:

Section 5(a)(1) — 2

Section 5(a)(6) — 2

Section 5(b) — 2, 7, 9

Section 5(c) — 8

In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 196

HARLEM PAPER PRODUCTS CORP. AND DAVID KASSON, PETITIONERS

v.

FEDERAL TRADE COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 23-33) is reported at 240 F. 2d 341.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1957. The petition for a writ of certiorari was filed on June 15, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that there is substantial evidentiary support for the Fed-

eral Trade Commission's finding that petitioners were parties to a nationwide price-fixing conspiracy.

2. Whether the Commission made adequate findings that petitioners were parties to the conspiracy.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45, provides in part as follows:

> (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> * * * * * *
>
> (6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> * * * * * *
>
> (b) * * * If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served * * * an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. * * *

STATEMENT

Petitioners seek review of the same judgment of the court of appeals of which review is sought in

Metropolitan Bag and Paper Distributors Association, Inc., et al. v. *Federal Trade Commission*, No. 190, this Term. The judgment upheld in part and reversed in part a Commission cease-and-desist order directed against a nationwide price-fixing conspiracy in the fine and wrapping paper business.

The facts are fully set forth in the Commission's brief in opposition in the *Metropolitan* case, to which we respectfully refer the Court. The only difference, insofar as the Commission proceedings were concerned, was that in the instant case petitioners filed an answer in which, in addition to consenting to the introduction of documentary and other evidence in support of the complaint and the drawing of inferences therefrom, they conceded that "the acts and practices thereby indicated may be deemed to reflect in effect an agreement or understanding," and stated that "they will not offer explanation of or evidence to contradict the evidence" which they consented to being made a part of the record (Pet. App. 208a).[1]

In holding that there was substantial evidentiary support for the Commission's finding that petitioners had participated in the nationwide conspiracy, the court of appeals pointed out that petitioner Kasson was "a leader in all aspects of restraint of trade in wrapping paper products in this region from 1934 to 1947," and was closely connected with both the national and the regional efforts at unfair competition (Pet. 29-30); that petitioner Harlem Paper

[1] "Pet. App." refers to petitioners' appendix in the court of appeals, and "Resp. App." refers to the Commission's appendix in that court.

Products Corporation ("Harlem") was a corporate member of one of the four local trade associations in greater New York, which the court found had been "engaged in a regional conspiracy to fix prices and credit terms of wrapping paper products from 1934 to the time of the complaint" (Pet. 26); and that Kasson had represented Harlem in 1948 on the board of directors of the national trade association (Pet. 29, 30).

ARGUMENT

1. Petitioners' principal contention (Pet. 10-18) is that the Commission's finding that they had participated in the nationwide price-fixing conspiracy in the paper industry is not supported by substantial evidence.[2] The court of appeals, however, fully considered that contention and resolved it against petitioners, and we submit that the correctness of that factual ruling does not present a question calling for further review by this Court. Moreover, we believe that the Commission was fully justified in concluding, on the basis of the record before it, that both petitioners were parties to the conspiracy.

Contrary to petitioners' argument (Pet. 16-17), the order against Kasson does not rest solely on the fact that, during the period of the conspiracy, he served as executive director and president of Cosmopolitan Twine & Paper Association, Inc. ("Cosmopolitan") (Pet. App. 35a), one of the four metropolitan New York City trade associations which, the

[2] Petitioners do not deny the existence of such a conspiracy.

court of appeals pointed out (Pet. 26), were "engaged in a regional conspiracy to fix prices and credit terms of wrapping paper products from 1934 to the time of the complaint."[3] In addition, the evidence showed that he had participated in, and addressed, meetings of Cosmopolitan at which price-fixing was considered and effectuated, and had conferred with representatives of the other New York City associations on that subject (Ex. 760, Resp. App. 38; Ex. 762, Resp. App. 39-40; Ex. 766, Resp. App. 42; Ex. 770, Resp. App. 44; Ex. 657-A—657-D, Pet. App. 304a-305a; Ex. 659A and B, Pet. App. 310a-311a; Ex. 660-A-660-C, Pet. App. 312a-313a; Ex. 747-A and B, Pet. App. 318a-319a; Ex. 752-A and B, Pet. App. 323a). As the court of appeals noted (Pet. 29-30), in 1943 Kasson urged members of Cosmopolitan to pay dues to the national association; he was also "the moving spirit in local efforts at uniform credit terms in 1941-1942, and he discussed a letter from the National Association in 1947 which dealt with the same topic." Kasson was a member of the board of directors of the national association (which the court of appeals found had "spearheaded" the conspiracy, Pet. 25) in 1948 and 1949, and during those years was a member of its Wrapping Paper Governing Committee (Ex. 868, 869, Resp. App. 48-49). Such participation in trade association activities which were "intended to eliminate price competition through the collective efforts" of their members was

[3] Cosmopolitan itself was an active participant in the national conspiracy.

proper evidence of his connection with the conspiracy. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 719. In the language of the court of appeals (Pet. 29), Kasson was "a leader in all aspects of restraint of trade in wrapping paper products in this region from 1934 to 1947," and, as such, was properly found by the Commission to have been a party to the conspiracy.

Petitioner Harlem was a member of Cosmopolitan, one of the four local New York City associations which had been active in the conspiracy. Kasson, whose connection with the conspiracy has already been summarized, represented Harlem in 1948 and 1949 on the board of directors of the national association (Ex. 868, 869, Resp. App. 48-49). The documentary evidence showing such representation also indicated that the other members of the board, and the various committee members, were representatives of dealers and not of local trade associations. Since Harlem had stated that it would not endeavor to contradict the documentary evidence which the Commission introduced, and had authorized the Commission to draw inferences from such evidence, we submit that it was not unreasonable for the Commission to have concluded, on the basis of the record before it, that Kasson in fact had represented Harlem in 1948 and 1949 on the board of directors of the national association.[1]

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[1] Although petitioners state (Pet. 6, 9, 10) that the national conspiracy terminated in 1947, the Commission did not so find. It found that the conspiracy had begun prior to that date, and had been "since carried out" (Pet. App.

In its petition for rehearing in the court of appeals, Harlem for the first time contended that the Commission's exhibits showing that Kasson served on the board of directors of the national association as a representative of Harlem were erroneous, and that in fact he was solely the representative of Cosmopolitan (the local trade association). The Commission opposed the petition on the theory that sound judicial practice would not permit such a belated attempt to disavow the stipulation upon which the case had been tried and upon which the court of appeals had upheld the sufficiency of the evidence, namely, that petitioners would not "offer * * * evidence to contradict the evidence" which, with their consent, the Commission had introduced (Pet. App. 208a). Such evidence included the documents showing that Kasson's membership on the board of directors of the national association in 1948 and 1949 had been as a representative of Harlem.

The Commission's power to modify or set aside its orders (38 Stat. 719, as amended, 15 U.S.C. 45(b)) is suspended while petitions for review thereof are pending. *American Chain & Cable Co., Inc.* v. *Federal Trade Commission*, 142 F.2d 909 (C.A. 4). But when the present review proceedings are terminated, Harlem may apply to the Commission to have the

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57a), *i.e.*, it had continued to the time of the Commission's decision (September, 1951). Since the conspiracy was a continuing one, evidence linking Kasson to Harlem was properly relied on, even though it related to events which occurred after the complaint had been filed but while the conspiracy was still operative.

order set aside as to it on the ground that Kasson was never actually connected with Harlem despite the evidence now of record. The Commission will, of course, act on such motion and vacate its order against Harlem if that is proper and appropriate. We believe, however, that the Commission properly entered an order against Harlem on the basis of the record before it, and that the court of appeals properly upheld that order and denied rehearing. The appropriate procedure was for Harlem to call the mistake, if such it be, to the Commission's attention while the proceeding was still pending before it, and not to wait until after the court of appeals had affirmed the Commission's order.[5] Even now, the proper method for attempting to correct any error that may have resulted from Harlem's failure timely to bring before the Commission the facts with respect to Kasson's relationship to Harlem is to seek modification of the order by the Commission, not to seek review of this factual question by this Court.

2. Petitioners also contend (Pet. 19-21) that the Commission failed to make "specific findings of fact" with respect to their being parties to the conspiracy,

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[5] Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. 45(c), provides for an application to the reviewing court for "leave to adduce additional evidence", upon a showing "to the satisfaction of the court that such additional evidence is material and that there were *reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission*" (emphasis added). Petitioners did not make such an application to the court of appeals. Their failure to do so can, in itself, be deemed a waiver of the point. See *Consolidated Edison Co.* v. *Na-*

as required by Section 5(b) of the Federal Trade Commission Act.

The Commission found (Pet. App. 57a) that, prior to 1947, "the respondent paper merchants, together with respondent associations, and respondent officers, have entered into and * * * carried out an unlawful planned course of action, understanding and agreement to hinder, lessen, eliminate, limit, and restrain competition in prices, practices, terms and discounts * * * in the sale and distribution of fine and wrapping paper," and, pursuant to such conspiracy, had engaged in a number of designated restrictive practices (*id.* 58a). Each of the respondents thus covered was identified (*id.* 14a-38a), including both petitioners (*id.* 35a). The Commission's findings also described in considerable detail the operations of the conspiracy, and set forth illustrative examples of the various price-fixing activities in which the conspirators engaged (*id.* 39a-56a).

Read in its entirety, we believe that these findings satisfied the command of Section 5(b) that the Commission "state its findings as to the facts." In a case of this magnitude, involving a nationwide conspiracy and more than 200 parties, the Commission is not required to make any further "particularization in its findings" (*Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 81), or to detail the evidence upon which it based its findings as to each respondent's participation in the conspiracy.

CONCLUSION

The decision below is correct, no important question is presented, and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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